

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**DIVISION OF JUDGES**  
**SAN FRANCISCO BRANCH OFFICE**

<b>GUBAGOO, INC.</b>	)	
	)	
<b>and</b>	)	<b>Case: 28-CA-203713</b>
	)	
<b>DANIEL BARTOLO, an individual</b>	)	
	)	
_____	)	

**RESPONDENT GUBAGOO, INC.'S**  
**POST-HEARING BRIEF**

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## **RESPONDENT'S POST-HEARING BRIEF**

Respondent Gubagoo, Inc. (hereinafter “Gubagoo” or “the Company”) files its Post-Hearing Brief and respectfully shows the following:

### **THE PARTIES**

Gubagoo is a corporation headquartered in Florida. Gubagoo satisfies the NLRB's commerce requirements and does not dispute jurisdiction in this case. The Charging Party Daniel Bartolo (“Mr. Bartolo”) is an individual who was employed by Gubagoo as a sales director until his employment was terminated on or about July 27, 2017.

### **INTRODUCTION**

Following a full day of testimony, the General Counsel cannot escape the fact that the record contains absolutely no evidence to establish that Gubagoo's decision to terminate Mr. Bartolo's employment was in anyway related to conduct protected under the NLRA. Significantly, the record is devoid of any credible evidence that Mr. Bartolo ever engaged in any protected activity prior to his supervisor's decision to terminate his employment or that the decision-maker had any knowledge of any alleged protected conduct. The only evidence in the record to support the General Counsel's theory that Mr. Bartolo allegedly threatened to go to the “Labor Board” is from Mr. Bartolo and should be rejected for the numerous reasons described below.

To the contrary, the evidence introduced at the Hearing, including Mr. Bartolo's own admissions, demonstrates that Mr. Bartolo consistently struggled in his sales director role and never met his monthly sales quotas. The undisputed testimony further demonstrates that Mr. Orlando considered terminating Mr. Bartolo in June, but decided to

give him another opportunity. As will be detailed below, it was what Mr. Bartolo did with that opportunity that ultimately led to his termination.

The General Counsel attempts to piece together a case through the dubious and fabricated testimony of Mr. Bartolo and mere implication. Mr. Bartolo's testimony – which the General Counsel relies upon to establish its entire case – is inherently unreliable and tainted, and must be discredited. To the contrary, Gubagoo offered the credible testimony of its decision-maker, Peter Orlando, which establishes that Gubagoo had a non-discriminatory reason to terminate a consistently poor performance when it did. *There is simply no evidentiary basis for the General Counsel's allegations.*

The evidence is compelling and unequivocal that Gubagoo did not commit any of the unfair labor practices alleged in the General Counsel's Complaint. For the reasons explained below, the ALJ should dismiss the General Counsel's Complaint in its entirety.

### **STATEMENT OF CASE**

The General Counsel filed the Complaint in this matter on behalf of Daniel Bartolo who filed an unfair labor practice charge with Region 28 of the National Labor Relations Board ("NLRB" or "the Board") on or about August 3, 2017. Mr. Bartolo's unfair labor charge alleged that Gubagoo terminated his employment with the Company in violation of Sections 8(a)(1) and 8(a)(4) of the National Labor Relations Act ("NLRA" or the "Act"). Gubagoo submitted a response to Region 28 denying the allegations contained in the Charge and explaining the Company's legitimate, non-discriminatory reason for the decision to terminate Mr. Bartolo's employment.

On November 30, 2017, the General Counsel issued a Complaint and Notice of Hearing (the “Complaint”) in this matter. The General Counsel’s Complaint simply alleges the following:

- On about July 24, 2017, Gubagoo, by Aaron Sheeks, threatened (1) Mr. Bartolo that filing charges with the Board would be futile; and; (2) Mr. Bartolo that they would be blackballed in the industry if they contacted the Board.
- On about July 27, 2017, Gubagoo discharged Mr. Bartolo.
- Gubagoo discharged Mr. Bartolo because he threatened to file a charge with the Board against Gubagoo.

According to the General Counsel, by the conduct described above, Gubagoo “has been discriminating against employees for filing charges or giving testimony under the Act in violation of Section 8(a)(1) and (4) of the Act.” [Complaint at ¶¶ 4, 5]

In addition to the allegations relating to Mr. Bartolo’s termination, the General Counsel also alleged that Gubagoo “has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.” According to the Complaint, Gubagoo interfered with the Section 7 rights of its employees by maintaining the following provision in its Employment Agreements with its sales directors:

### **11. Confidentiality**

(a)[...] Confidential Information includes, without limitation, [...] employee [...] lists and personnel information of employees; numbers and location of sales representatives [...].



[Complaint at ¶ 4, 6]<sup>1</sup>

A hearing was held in this matter in Phoenix, Arizona on March 13, 2018. As detailed below, the evidence presented at the Hearing was compelling and unequivocal and clearly demonstrates that the General Counsel did not meet its burden to establish that Gubagoo engaged in any conduct that violated either Section 8(a)(1) or 8(a)(4) of the NLRA. The record in this case is devoid of any evidence to support the General Counsel's allegations. Accordingly, Gubagoo respectfully requests that the General Counsel's Complaint be dismissed in its entirety.

### **STATEMENT OF FACTS**

#### **I. GUBAGOO.**

Gubagoo is a company headquartered in Florida. The Company employs over 400 employees mostly at its two facilities in Daytona and Boca Raton, Florida. [TR 100:3 – 8] The Company's name is an acronym for “the Good, the Ugly, the Bad, and the Awesome in our dealers' website traffic and the ‘goo’ represents stickiness,” which is how the Company converts web traffic into leads. [TR 101:19-102:1]<sup>2</sup>

Gubagoo provides advanced customer communication solutions to the automotive industry. Auto dealers hire Gubagoo to convert their web traffic into leads for the dealer

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<sup>1</sup> The General Counsel's Complaint initially alleged that multiple provisions contained in Gubagoo's Employment Agreement were unlawful. On March 6, 2018, the General Counsel filed a notice of intent to amend the Complaint to withdraw all but this allegation relating to the definition of “Confidential Information.”

<sup>2</sup> Citations to the Transcript of the Hearing shall be cited as “TR [page]”; hearing exhibits introduced by Counsel of the General Counsel shall be cited as “GC Ex. [number]” and exhibits introduced by the Respondent shall be cited as “R Ex. [number]”

to use. The Company offers a number of different products, including chat, inbound text, and a service called “Publisher.” [TR 100:9 - 101:18]

The Company’s most popular product is its chat product. With Gubagoo’s chat product, when a prospective customer goes to a participating dealer’s website, a box pops up and a Gubagoo operator interacts with the prospective customer to answer certain questions. [TR 100:25 – 101:11] The Company also offers dealerships its Publisher product, which provides incentives to prospective customers based on their browsing history. [TR 101:12-18]

## **II. GUBABOO’S SALES DEPARTMENT.**

Gubagoo has a sales department, which is led by the Company’s Vice President of Sales, Peter Orlando. Mr. Orlando reports directly to the Company’s Chief Executive Officer Brad Title. Mr. Title is actively involved in all aspects of the Company, including Gubagoo’s sales department. The sales department is made up of the Company’s outside sales team of regional sales directors and an inside sales team. Both groups report directly to Mr. Orlando. As the VP of Sales, Mr. Orlando is primarily responsible “for the overall [sales] number, month after month, the growth of the Company.” [TR 102:10 – 103:2]

In 2017, Gubagoo had approximately 12 regional sales directors. [TR 103:3-8] Mr. Orlando was responsible for finding, interviewing, hiring and training all of the regional sales directors. He was also responsible for managing all aspects of the regional sales directors’ performance, including the authority to discipline and terminate them. [TR 103:9-104:12]

Gubagoo hired Mr. Bartolo in early April 2017 as a sales director based in Arizona. Gubagoo hired Mr. Bartolo to cover a territory in the west, which covered Arizona, New Mexico, Washington, Oregon, Idaho, Colorado, and North and South Dakotas. [TR 104:13-105:10] As a regional sales director, Mr. Bartolo was responsible for identifying the largest dealer groups in his region to which to sell Gubagoo's products. He was also responsible for networking with companies that drive traffic to websites and, ultimately, for meeting certain sales quota goals. [TR 105:20] Throughout his employment with the Company, Mr. Bartolo reported directly to Peter Orlando, the Company's Vice President of Sales. [TR 117:3-15]

At the start of his employment with Gubagoo, Mr. Bartolo flew down to the Company's offices in Daytona, Florida for a week-long training session. Mr. Bartolo attended the training with three other sales directors who had just started their employment with Gubagoo. The focus of this initial sales training was to teach the sales directors the seventy slide PowerPoint presentation, which they would use to present to prospective customers. In addition, in the training, Gubagoo helped the sales directors get a comprehensive understanding of the Company's products and how to pitch those products to customers. During the initial week of training, Mr. Bartolo struggled to grasp the PowerPoint and was unable to present past the first few slides. [TR 107 17:22]

Following the initial sales training in Florida, Mr. Orlando conducted daily training webinars with the new sales directors. This training continued to focus on four separate areas critical to their success as sales directors: understanding the PowerPoint, going live

and being able to present it to customers, and then learning the Company's back-end tools.

[TR 107:23 – 108:9]

During the initial sales training in Florida, Mr. Orlando explained to the sales directors on more than one occasion what the Company's expectations were regarding their performance. Mr. Orlando explained to Mr. Bartolo, and the other new sales directors, Gubagoo's expectations regarding outbound calls and the amount of demos that each sales director was expected to make to customers each week. Specifically, he told them that they needed to complete a minimum of five demos per week, which meant that they needed to schedule at least ten demos per week because Gubagoo had a documented 50% show rate. Mr. Orlando also told the sales directors that the sales quota was ten sold chat contracts per month. He also informed them that Gubagoo expected them to do between forty and fifty calls per day in order to meet these sales quotas.<sup>3</sup> During the first four weeks in the role, Mr. Orlando understood that the sales directors were still learning the PowerPoint and how to pitch the product, so he did not hold them to the ten sold contracts per month requirement. [TR 108-10]

### **III. MR. BARTOLO STRUGGLES IN THE SALES DIRECTOR ROLE.**

At the conclusion of his first month at Gubagoo, Mr. Bartolo still did not have the product knowledge to independently pitch to customers. While the other new sales directors were beginning to do their own presentations to clients, Mr. Orlando continued

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<sup>3</sup> Gubagoo monitored call volume through its CRM system called, BIG. As part of their responsibilities, the sales directors were supposed to record their calls into BIG. The Company provided the sales directors with regular training on how to use the CRM system during the initial month of training. [TR 112]

to work with Mr. Bartolo and to participate in Mr. Bartolo's pitches to customers. Because of his struggles, Mr. Orlando had to constantly monitor Mr. Bartolo's performance. [TR 111]

Gubagoo's expectation is that sales directors begin to hit their sales quota by selling a minimum of five chat contracts during their second full month of employment. However, even if they are not meeting their sales numbers, Mr. Orlando still expected them to at least to meet their activity goals with respect to call volume and number of scheduled demos per week. [TR 111-112]

During his first month after training, May 2017, Mr. Bartolo only sold three contracts – below the expectation of a minimum of 5 contracts. Moreover, as to the contracts that Mr. Bartolo did sell, Mr. Orlando was actively involved in those sales, as he did a "majority of the presentation" and "actually closed the deal(s)" himself. By this point, Mr. Orlando had "constant concerns" with Mr. Bartolo's performance and he did not feel that Mr. Bartolo would be able to succeed in his role. [TR 113]

In June 2017, Mr. Bartolo only sold two chat contracts. As a result, Mr. Orlando told Mr. Title that he believed Mr. Bartolo should be terminated because it did not appear that the job was "a fit for him." In response, Mr. Title suggested to Mr. Orlando that he give him another chance, as the Company prepared for its big sales meeting in July. Mr. Orlando continued to have regular, daily calls with Mr. Bartolo to help him improve his performance. During these calls, Mr. Orlando would go over "prospecting questions that he might have on a product, CRM questions, how to send a contract, [and] you name it." Because of Mr. Bartolo's performance issues, Mr. Orlando was working with him more

than he typically worked with the regional sales directors at that point in their employment.  
[TR 114 – 115]

Moreover, Mr. Bartolo clearly recognized that he was not meeting Gubagoo's expectations. For example, on June 30, 2017, Mr. Bartolo wrote Mr. Orlando stating:

I'm only gonna end up with 4 total contracts sold.

If your gonna fire me for not hitting my numbers *I understand*.

[TR 115, R Ex. 1 (emphasis added)] He also wrote Mr. Orlando a text that same day in which he stated, "I let u down, if you gonna fire me I understand." [R Ex. 2] In fact, Mr. Bartolo only sold two contracts in June, not the four he said he would "end up with" for the month. [TR 114]

#### **IV. THE JULY 2017 SALES CONFERENCE IN FLORIDA.**

On or about July 19, 2017, Gubagoo held a sales conference for all of its sales employees in Daytona, Florida. [TR 116] Shortly before the sales conference, Gubagoo hired a national sales manager, Aaron Sheeks, to help develop the Company's inside sales team and to assist Mr. Orlando as needed. Although Mr. Sheeks worked with the sales directors, he did not directly supervise them. [TR 117:3-15]

The purpose of the sales conference was to motivate the sales team to improve their sales and to introduce a new PowerPoint, which the sales directors would start using to pitch to customers. The new PowerPoint, which was developed by Mr. Orlando and Mr. Title, was a major change in the Company's sales strategy. [TR 117:18-23] At the sales conference, Mr. Orlando informed the sales team that the Company would be conducting mandatory sales training, via webinar, the following week on Gubagoo's new PowerPoint.

Gubagoo made it clear that participating in the daily morning trainings was “absolutely” *mandatory*. [TR 119; 127:1-12]

During the sales conference, Mr. Orlando and Mr. Title talked to the sales team about improving their performance. Mr. Title conveyed the message to the team that they “needed to get better and be more strategic to our dealers.” Mr. Title’s message, which focused on time management and improving performance, was admittedly “pretty harsh.” [TR 118] As of the time of the meeting, Mr. Bartolo and another sales director, Jason Jones, were the lowest rated sales directors in terms of sales. [TR 118]

Both Mr. Orlando and Mr. Title spoke to the sales team about the importance of consistently making their required outbound calls. [TR 120] Mr. Title also told the team that he expected them to make calls on Saturday, including the day after the conference ended, because that was the best day for them to get ahold of general managers at the dealers they were targeting. According to Mr. Orlando, there was a clear understanding that the sales team, including Mr. Bartolo, were supposed to make calls upon their return home on Saturday. [TR 121-122]

The sales conference was scheduled to end on Friday, July 21 at 5:00 p.m. However, Mr. Bartolo told Mr. Orlando that he had his parent’s 50<sup>th</sup> anniversary party on Friday night, so he needed to leave early. Gubagoo agreed and allowed him to change his ticket to return to Phoenix early, so he could attend his parents’ anniversary party that evening. Nonetheless, Mr. Bartolo was still expected to make outbound calls the next day (Saturday). [TR 121-22]

**V. MR. ORLANDO MAKES THE DECISION TO TERMINATE MR. BARTOLO'S EMPLOYMENT.**

On Monday, July 24, 2017, Gubagoo reviewed the Company's CRM system, BIG, to see which sales directors had logged outbound calls made on the previous Saturday, as discussed at the meeting. Mr. Orlando discovered that Mr. Bartolo and Jason Jones had failed to make the required calls. After Mr. Orlando wrote to Mr. Bartolo about his failure to do so, Mr. Bartolo responded by claiming that there must have been a "mis understanding (*sic*)," as he had his "parents 50<sup>th</sup> wedding anniversary this weekend."<sup>4</sup> [TR 122-23]

Because the two lowest performers on the sales team (Mr. Bartolo and Mr. Jones) had both failed to make the required Saturday calls, Mr. Orlando placed both individuals on a performance improvement plan ("PIP"). [TR 123-125; GC Ex. 3; R Ex. 8] As of July 24, Mr. Bartolo had sold zero contracts for the month of July. [R Ex. 8] Under the PIP issued to Mr. Bartolo, he was expected to do all of the following:

- 1) Meet your weeks forecast of 2 sold chat deals from July 24<sup>th</sup> to 28<sup>th</sup>
- 2) Personally scheduling a minimum of 5 demo's a week and completing 5 demos a week
- 3) 50 logged calls in BIG each day of the week
- 4) 10 billable sold chats deals in August

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<sup>4</sup> As will be discussed below, Mr. Bartolo's testimony regarding his parents' 50<sup>th</sup> wedding celebration is all over the board. In the end, it seems as though the wedding celebration was Saturday morning through lunchtime and then his parents left to go to Sedona and he stayed at their house to watch their dogs. [TR 65:5-9] He entirely failed to explain why he could not make any calls on Saturday after they left.



[R Ex. 8] Mr. Orlando issued a similar PIP to Mr. Jones who immediately improved his performance and, within a short period of time, became Gubagoo's top salesperson. [TR 124-25] Although just a few weeks earlier, Mr. Bartolo had acknowledged his performance problems and told Mr. Orlando that he would understand if Gubagoo were to fire him, he responded to the PIP by claiming that "he was being targeted." [TR 125; R8]

The sales training for the new PowerPoint began on Monday morning at 8:00 a.m. Eastern. Although it was early for those on the west coast (including Mr. Orlando), Mr. Title had insisted that it start at that time. The training was *critical* because it covered the Company's new sales process, including the new PowerPoint that the sales directors were to use to pitch customers. [TR 126 – 27]

Mr. Bartolo missed the entire training on Tuesday, July 25, and he was late for the training on Wednesday, July 26. [TR 127-28] No other sales director missed any of the required trainings. [TR 128] Because Mr. Bartolo had missed, and was late for, the *mandatory* sales meetings just days after being placed on the PIP, and he had shown no real signs of improvement,<sup>5</sup> Mr. Orlando made the decision to terminate Mr. Bartolo's employment on July 27, 2017. Specifically, in describing his decision, Mr. Orlando testified:

Q (Counsel for Gubagoo): And what happened next with respect to his employment?

A: On Thursday the 27th, I decided to terminate him.

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<sup>5</sup> As will be explained below, although his call volume spiked substantially during the week of July 24<sup>th</sup>, Mr. Orlando was suspicious of the information provided because Mr. Bartolo failed to secure any demos as a result of the significant increased call in volume.

Q: And why was that?

A: Because we just came off this meeting, and it was very serious, that we had to change our behavior. That weekend, he decides not to make any calls. I placed him on a performance enhancement plan on Monday, and he decides to completely miss our meeting on Tuesday, late on Wednesday. When I looked at his completed demos, he had zero, completed one demo for the week, for the entire month of July. He had two scheduled for the week, one we gave him, and I determined at that time there's no way he could be successful in this role, and I decided to fire him.

Q: And was the decision to terminate Mr. Bartolo's employment your decision?

A: Yes.

Q: And when did you make that decision again?

A: Thursday.

Q: Thursday, what date?

A: What date? The 27th.

Q: Prior to making that decision, did you talk to anybody else about the decision?

A: No.

Q: Did you discuss the decision with Aaron Sheeks?

A: I did not.

Q: Did you discuss the decision with Brad Title?

A: I did not.

[TR 128-29]

### **WITNESS CREDIBILITY**

The General Counsel's case hinges *entirely* on the credibility of Mr. Bartolo as a witness. Unless Mr. Bartolo's testimony is fully credited, the General Counsel cannot establish a *prima facie* case for the General Counsel's allegations relating to his

termination. Credibility determinations rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *See, e.g., Aliante Station Casino & Hotel*, 358 NLRB No. 153, slip. op. 79-80 (Sept. 28, 2012); *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Mr. Bartolo's testimony was riddled with inconsistencies and is wholly unreliable. For the reasons highlighted below, the ALJ should reject Mr. Bartolo's testimony in its entirety.

Mr. Bartolo's testimony was rife with contradictions and often defied any logical explanation. Mr. Bartolo consistently fabricated testimony and exaggerated facts on issues both big and small, relevant and irrelevant. For example, Mr. Bartolo's testimony concerning his relationship and interaction with Aaron Sheeks had numerous contradictions and simply did not make sense:

- Although Mr. Bartolo testified on direct that he reported to Mr. Orlando [TR 19:22 – 24], on cross examination, he suddenly testified that Mr. Sheeks was his “supervisor.” When questioned as to why he believed that Mr. Sheeks was his “supervisor,” he claimed that Mr. Orlando had introduced Mr. Sheeks as his “new manager.” However, he then went on to acknowledge that Mr. Orlando subsequently issued him his Performance Improvement Plan and notified him of his termination. He offered no testimony to support his claim that Mr. Sheeks was his

“supervisor” or to show that Mr. Sheeks had exercised any supervisory authority over him.<sup>6</sup> Of course, his testimony was also directly contradicted by the testimony of Mr. Orlando who clearly and credibly testified that he was Mr. Bartolo’s supervisor throughout his employment with the Company. [TR 117:3-15]

- Nor is there any support in the record for Mr. Bartolo’s statement that he had “regular contact” with Mr. Sheeks during his employment at the Company. [TR 20:6-14] Significantly, as Mr. Orlando explained, Mr. Sheeks did not even start his employment with Gubagoo until July 18 or 19, 2017, *less than ten days prior to Mr. Bartolo’s termination*. [TR 118:5-9] Consistent with Mr. Orlando’s timeline, Mr. Bartolo later testified that he did not meet Mr. Sheeks until the week before his termination when they met at the airport on the way to the sales meeting in Florida. [TR 91:10 – 92:3]

Moreover, Mr. Bartolo’s testimony concerning his performance during his time at Gubagoo should also be discredited. Among other things, Mr. Bartolo denied being a low performer and repeatedly denied having told Mr. Orlando that he would understand if Gubagoo terminated him based on his poor performance. [TR 47-48] Despite this, he did

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<sup>6</sup> In fact, Mr. Bartolo specifically testified that Mr. Sheeks did not know about his termination (because it was not Mr. Sheeks’ “doing.” [TR 37:4-11]

acknowledge his performance problems, but suggested those problems were limited to a certain period of time. Specifically, Mr. Bartolo testified on direct examination:

Q (Counsel for the GC): And why did you -- was there a reason why you spoke with Mr. Orlando at this time?

A (Mr. Bartolo): Yes. We had a little meeting with the sales managers, the sales reps, and that how we were doing a poor job and that they should fire us and that if we can't get on board, we ought to be terminated in a much profane manner. I told Peter, like my concerns about being -- going to get fired and if I had anything to worry about and felt like I was being targeted, and he said, you'll be fine.

Q: Okay. And just to be clear for the record, I want you to start at the beginning of your conversation with Mr. Orlando and walk us through what was said and by who.

A: Okay. I grabbed Pete, drew him aside and, you know, said do I had anything to worry about? I feel like -- feel very uncomfortable, that I feel like I'm going to get fired, and do I have anything to worry about? I also feel like I'm being targeted and that -- *because I had a very poor month, and I was pretty much scared for my job.*

[TR 25:8 – 25 (emphasis added)] Ultimately, on cross-examination, Mr. Bartolo changed his testimony and admitted that he did tell Mr. Orlando on at least two separate occasions that he would understand if Gubagoo terminated him based on his low performance. In an email on June 30, 2017, Mr. Bartolo specifically told Mr. Orlando, “If your gonna fire me for not hitting my numbers *I understand*” and then he repeated the same message in a text to Mr. Orlando. [TR 115, R Ex. 1, R Ex. 2 (emphasis added)] Moreover, Mr. Bartolo’s

testimony regarding how many contracts he sold during his time at Gubagoo was inconsistent and contradicted by both the testimony of Mr. Orlando and the documentary evidence in the record. [TR 43:7 – 45:11; 154:20-22; GC Ex. 4]

Mr. Bartolo's testimony that Mr. Orlando told him at the sales conference that the month of July would be "a wash" must be rejected. Immediately after testifying that Gubagoo management's message to the sales team at the sales conference was "we were doing a poor job and that they should fire us and that if we can't get on board, we ought to be terminated in a much profane manner," Mr. Bartolo then testified that he was told by Mr. Orlando that July would be "a wash." [TR 25-26] Given the rest of his testimony, as well as the credible testimony of Mr. Orlando, Mr. Bartolo's claim makes absolutely no sense. Mr. Bartolo testified at length that the sales meeting was intense with Mr. Title using strong and "profane" language to stress the need for the sales team to improve their performance. Moreover, as Mr. Orlando noted, he had contemplated terminating Mr. Bartolo weeks earlier for his performance deficiencies. [TR 114-15] When asked about this, Mr. Orlando credibly denied ever making such a comment and explained why he would have not do so:

Q: Did you ever tell Mr. Bartolo that July was a wash?

A: *Never.*

Q: And why is that?

A: Listen, we had a very serious meeting. The last thing I'm going to go up to Dan and tell him, hey, you know, you're at zero for the month and you have such poor performance, I'm just going to -- just go ahead and make this month a wash. I would not do

that. That would counter everything that we were discussing that weekend or that conference.

[TR 124:6 – 15 (emphasis added)] There is simply no basis for Mr. Bartolo's testimony.

Additionally, Mr. Bartolo's testimony regarding his admitted failure to follow Mr. Title's directive to the sales team to make calls on the Saturday following the sales conference is nothing short of extraordinary. On direct, Mr. Bartolo testified that he spoke to Mr. Orlando at the sales conference and told him that he had a "previous family function that I needed to attend, that I could not make phone calls on Saturday." [TR 26:17 – 27:2] To the contrary, Mr. Orlando denied that Mr. Bartolo ever told him that he could not make calls on Saturday and specifically recalled Mr. Bartolo telling him that he needed to get back for a Friday evening anniversary celebration. [TR 121-22] Moreover, on cross-examination, Mr. Bartolo testified that he spent the morning with his parents and then had lunch with them before they left for Sedona. When asked why he then did not make the phone calls on Saturday afternoon, he *incredibly* testified that the instructions from Mr. Title were to make the calls *on Saturday morning*. Specifically, he testified:

Q: Okay. And I believe your testimony was that you had a big lunch with your parents on Saturday. Is that correct?

A: Yes, I did.

Q: And then they went up to Sedona?

A: Yes, sir.

Q: Okay. So why couldn't you make phone calls on Saturday?

A: Because it was my parents' 50th wedding anniversary for lunch -- for breakfast, lunch, all morning, all afternoon.

Q: But you said then after the big lunch, they left and went to Sedona.

A: Yes, sir. The requirements were to make calls Saturday morning, not in the afternoon.

Q: So now you're saying Mr. Title told you if you could make calls Saturday morning.

A: Yes.

[TR 61 – 62] When questioned further, he then said he could not make phone calls in the afternoon because he had to watch his parents' dogs after they left to go to Sedona. [TR 65] He seemed to then change his testimony again to suggest that the Saturday calls were not mandatory, but that Mr. Title had only said the sales directors were expected to make Saturdays "if we were able to." [TR 59 – 60] What is clear is that Mr. Bartolo could have made the phone calls if he wanted to do, but simply failed to do so. [TR 65]

Mr. Bartolo's description of the first sales training call was even inaccurate. According to Mr. Bartolo, Mr. Title was on the July 24, 2017 training call and specifically asked the sales director whether they had made the required Saturday calls. Moreover, Mr. Bartolo claimed that, after him and another sales director acknowledged that they had not made the required call, Mr. Title "chimed in that they're going to be putting us on a performance plan." [TR 28 – 29] Significantly, as Mr. Orlando testified Mr. Title was *not* on the July 24<sup>th</sup> training call. Moreover, Mr. Orlando did not email the sales team asking whether they had made calls on Saturday (notably not just Saturday morning) *until 10:04 a.m.* – several hours after the call. [R Ex. 5] Mr. Bartolo responded at 11:46 a.m. claiming that there must have been a misunderstanding because he could not make any calls that day



because of his parents' anniversary. [*Id.*] Obviously, Mr. Orlando would not have sent the email asking whether the sales team had made the calls if the issue had already been addressed during the sales training call several hours earlier. This is one of many examples of Mr. Bartolo's clear disregard for the truth.

There is also completely no basis for Mr. Bartolo's claim that he sent an email to both Mr. Sheeks and Mr. Bartolo at some point after getting his PIP stating that he would be "contacting the Labor Board." [TR 34] *This is completely fabricated.* Not only did Mr. Orlando adamantly deny ever receiving such an email, the only email that Gubagoo is aware of is Mr. Bartolo's response to the PIP on July 24, 2017 in which he stated he felt he was "being targeted which caused a very hostile work environment." [TR 129:21-130:13; GC Ex. 3] This email makes *no* mention of going to the "Labor Board" nor did Mr. Bartolo have any basis to do so. Gubagoo produced the only email that it had ever received in which Mr. Bartolo threatened to bring a claim, which was an email that he wrote to Mr. Orlando *a week after his termination.* In the email, Mr. Bartolo threatened "legal action" and that he would be taking Gubagoo "to court" because he did not believe his final pay was accurate (which it was). [R Ex. 7] At no time did Mr. Bartolo ever threaten to go to the "Labor Board," or the courts, relating to his treatment while employed by the Company. Again, Mr. Bartolo's baseless attempt to manufacture a claim where none exists must be rejected.

Finally, the ALJ should also completely reject Mr. Bartolo's self-serving testimony regarding a purported conversation that he had with Mr. Sheeks after he claims to have sent a phantom email allegedly threatening to go to the "Labor Board." Mr. Bartolo's

testimony is completely illogical on this point and is clear fiction. Specifically, when asked about the call with Mr. Sheeks on direct, Mr. Bartolo testified, in relevant part:

[Sheeks] called me and asked me what was wrong. I explained to him that I didn't like the way I was being treated, you know, that Pete was being unfair based on what happened in Florida. I let him know that I was very frustrated because of everything that was required, and that if I get fired, I would be contacting the National Labor Board. He responded that the National Labor Board can't do anything at all because I signed an agreement that they can terminate at any point in time. Arizona is a right to work state. I informed Aaron there's still regulations that they have to follow -- that you have to follow and that they were being unfair, and that if you do contact the Labor Board, that we'll make sure you won't get a job in the auto industry again. And I said, are you going to call my friends at the car dealerships? Then he goes, calm down. We don't need to go -- calm down. We don't need to go there. Stay focused, stay on the task at hand, you're doing a job, and we'll get through this and you have nothing to worry about. You know, I mean he defused the situation. Aaron was a -- Aaron's a great guy.

[TR 35] Among other things, it is absolutely ridiculous to suggest that Mr. Sheeks – who had been employed by Gubagoo for just over a week at that point – would have referenced Mr. Bartolo’s employment agreement as the basis for telling Mr. Bartolo that NLRB could not help him. However, it is even more incredible for Mr. Bartolo to have testified that Mr. Sheeks – who lived thousands of miles away in northern Illinois – would have known that Arizona was a “right to work state,” and would have made that point in his conversation with Mr. Bartolo.<sup>7</sup> His testimony simply does not make sense and the weakness of Mr. Bartolo’s description of his purported call with Mr. Sheeks became even more apparent on cross-examination.

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<sup>7</sup> Notably, nowhere in the Employment Agreement that the General Counsel introduced is there any reference to the term “right to work.” [GC Ex. 2]

These are just a few of the many examples of the inconsistencies that can be found throughout Mr. Bartolo's testimony. Mr. Bartolo's testimony was inherently unreliable and must be rejected.

### **ARGUMENT**

The General Counsel bears the burden of establishing each element of its contention that Gubagoo violated the Act. *See, e.g., KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975). That "burden never shifts, and ... the discrediting of any of Respondent's evidence does not, without more, constitute affirmative evidence capable of sustaining or supporting the General Counsel's obligation to prove his case." *Id.*; *see also NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966) ("The mere disbelief of testimony establishes nothing.") As set forth below, the General Counsel has not satisfied his burden.

#### **I. THE GENERAL COUNSEL FAILED TO DEMONSTRATE THAT GUBAGOO VIOLATED SECTION 8(a)(1) BY MAINTAINING AN OVERLY BROAD PROVISION IN ITS EMPLOYMENT AGREEMENT FOR SALES DIRECTORS.**

In his Complaint, the General Counsel alleges that Gubagoo interfered with the Section 7 rights of its employees by maintaining the following provision in its Employment Agreements with its sales directors:

##### **11. Confidentiality**

(a)[...] Confidential Information includes, without limitation, [...] employee [...] lists and personnel information of employees; numbers and location of sales representatives [...].

[Complaint at ¶ 4, 6] The only evidence that the General Counsel introduced relating to this allegation was Mr. Bartolo's testimony that he "believe[d]" that the exhibit was "the

T's and C's of the contract” and that he believed it was attached to an email that he received. [TR 19]<sup>8</sup> This simply is not sufficient to meet the General Counsel’s burden.

In *The Boeing Co.*, 365 NLRB No. 154 (Dec. 15, 2017), the Board overturned *Lutheran Heritage*, holding that when evaluating facially neutral employer policies, the Board would apply a balancing test, assessing “the nature and extent of the [rule’s] potential impact on NLRA rights” against the “legitimate justifications associated with the rule.” In addition to imposing a new test for work rules, *Boeing* set forth three categories of employer rules, providing a roadmap for parties in future cases to assess how the Board will analyze the legality of particular rules:

“Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.”

“Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.”

“Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.” The Board cited a rule that prohibits employees from discussing wages or benefits as one it would classify under Category 3.”

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<sup>8</sup> Beyond that, the only evidence in the record relating to the provision is the parties’ stipulation that sales directors were subject to the confidentiality provision contained in the Employment Agreement. [TR 10]

While the General Counsel will undoubtedly argue that the rule at issue in this case falls within Category 3 under *The Boeing Co.*, the definition of “confidential information” in the Employment Agreement does not specifically prohibit employees from talking about “wages or benefits.” To the contrary, the provision is much more specific than that and only includes “employee [...] lists and personnel information of employees, numbers and location of sales representatives [...].” Therefore, at most, the rule should be categorized as Category 2 rule, which the General Counsel must demonstrate interferes in some way with the Section 7 of rights of its employees. Since the General Counsel offered no evidence of such interference, this allegation should be dismissed.

**II. THE GENERAL COUNSEL’S ALLEGATIONS OF UNLAWFUL THREATS BY AARON SHEEKS SHOULD BE DISMISSED.**

The General Counsel alleges in his Complaint that Gubagoo unlawfully threatened Mr. Bartolo on July 24, 2017 by: (1) telling Mr. Bartolo that filing charges with the Board would be futile; and; (2) by telling Mr. Bartolo that they would be blackballed in the industry if they contacted the Board. As noted above, for the General Counsel to succeed on this claim, the ALJ must accept Mr. Bartolo’s testimony in its entirety, which she simply should not do. However, as explained below, even if the ALJ were to disregard the significant credibility issues outlined above and accept Mr. Bartolo’s testimony on this point, the General Counsel’s allegations regarding unlawful threats still fails.

The success of the General Counsel’s allegations is entirely dependent on the ALJ believing Mr. Bartolo’s testimony regarding all of the following:

- (1) that Mr. Bartolo sent an email on July 25, 2017 to both Mr. Sheeks and Mr. Orlando in which he referenced going to the “Labor Board”;
- (2) that Mr. Sheeks then called him in response to that email; and
- (3) that Mr. Sheeks made the alleged threats during the conversation on July 25<sup>th</sup>.

As will be explained below, there are many reasons why Mr. Bartolo’s testimony regarding his purported discussion with Mr. Sheeks point should be rejected. <sup>9</sup>

As an initial point, the timeline in this case – which is so very critical to the allegations – has been wildly inconsistent. Although the General Counsel’s Complaint alleges that Mr. Sheeks made the alleged threats on July 24<sup>th</sup>, Mr. Bartolo claimed that his conversation with Mr. Sheeks did not occur until July 25. [TR 87-88] Of course, Mr. Bartolo alleges that the threats came in a conversation that occurred in response to his phantom email to Mr. Orlando and Mr. Sheeks, which he claims he did not send until July 25<sup>th</sup>. [TR 34] Significantly, Mr. Orlando denied ever receiving such an email and there is no evidence in the record of the email’s existence. [TR TR 129:21-130:13] There is evidence in the record that Mr. Bartolo responded to the PIP, via email, within hours of receiving it on July 24<sup>th</sup>. In that email, Mr. Bartolo expressed concerns that he was being treated unfair. [R Ex. 3] *He did not, however, make any reference to going to the “Labor Board”* in his July 24<sup>th</sup> email. [*Id.*] At no point in his testimony did Mr. Bartolo ever

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<sup>9</sup> As represented by Gubagoo’s counsel in its Emergency Motion to Allow Video Testimony of Out-of-State Witness, Mr. Sheeks was scheduled to testify at the Hearing, but because of a number of unforeseen personal reasons, he was unable to attend in person or make it to a NLRB office to testify via videoconference. Notably, the General Counsel opposed the Emergency Motion.

explained why – after sending his initial response to the PIP – he then decided to send yet another email the following day threatening to go to the “Labor Board.” Both the substance and the timeline of Mr. Bartolo’s testimony do not support the General Counsel’s allegation that he was subject to unlawful threats.

Moreover, even if such conversation did occur (a fact for which there is no credible evidence in the record to support), Mr. Bartolo himself denied that Mr. Sheeks ever told him that it would be “futile” to go to the Board. Specifically, Mr. Bartolo testified:

Q: Okay. Did Mr. Sheeks ever tell you that it would be "futile to file a charge"?

A: Pardon me.

Q: Did Mr. Sheeks ever tell you that it would be "futile to file a charge"?

A: I don't know what that means.

[TR 89-90] Even if the ALJ were to accept *all* of Mr. Bartolo’s testimony regarding his alleged conversation with Mr. Sheeks, the ALJ simply cannot conclude that Mr. Sheeks threatened him by telling him it would be “futile” to file a charge with the “Labor Board.”

Nor is there any evidence in the record to support the General Counsel’s allegation that Mr. Sheeks threatened Mr. Bartolo by telling him that he would be “blackballed” in the auto industry. Although Mr. Bartolo testified at the Hearing that Mr. Sheeks specifically used the term “blackball” during their conversation, Mr. Bartolo incredibly did not use the term “blackball” when describing his conversation with Mr. Sheeks in the Affidavit he provided to the Region shortly after he filed his charge. [TR 90:5-23] Like

the rest of Mr. Bartolo's testimony in this case, his testimony on this subject is clearly fabricated and should be rejected.

Because the General Counsel failed to produce credible evidence at the Hearing to support his allegations of unlawful threats, those allegations must be dismissed.

**III. THE GENERAL COUNSEL'S ALLEGATION THAT GUBAGOO TERMINATED MR. BARTOLO IN VIOLATION OF SECTIONS 8(a)(1) and 8(a)(4) MUST BE DISMISSED.**

In the Complaint, the General Counsel alleges that, by terminating Mr. Bartolo, Gubagoo "has been discriminating against employees for filing charges or giving testimony under the Act." [Complaint at ¶ 7] For the reasons explained below, the General Counsel failed to meet its burden to establish *prima facie* cases of retaliation or discrimination and the General Counsel's termination allegation must be dismissed.

Section 8(a)(4) of the Act makes it unlawful, "to discharge or otherwise to discriminate against an employee because he has filed charges or given testimony under this Act." When an employer discharges an employee allegedly for conduct unrelated to protected activity, the Board must determine whether an unlawful consideration—the protected activity of the employee or other employees—entered into the decision making process and, if so, whether it affected the outcome of that process. In such situations, the Board follows the mixed motive analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must satisfy an initial burden of showing by a



preponderance of the evidence that the employee's protected activity was a motivating factor in an employer's adverse action.

If the General Counsel succeeds in creating a presumption that the adverse action violated the Act, the employer then bears the burden to prove that the same action would have taken place even in the absence of the protected conduct. *Id.* To rebut the presumption, an employer "must only show that it reasonably believed" that the employee engaged in conduct warranting the adverse employment action. *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995), *GHR Energy Corp.*, 294 NLRB 1011, 1012-13 (1989), *aff'd*, 924 F.2d 1055 (5th Cir. 1991).

Further, if the employer establishes its affirmative defense, the General Counsel bears the burden of rebutting the defense. If the employer "goes forward" with evidence supporting its affirmative defense, the General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the challenged adverse action would not have taken place in the absence of the employee's protected activities." *Comcast Cablevision*, 313 NLRB 220, 253-54 (1993); *St. Luke's Hospital*, 312 NLRB 425, 439 (1993). Even if a disciplinary action appears extreme, it does not follow that the proffered reason for the action is pretextual. Simply put, if an improper motive is not involved, the question of proper discipline of an employee is a matter "left to the discretion of the employer" which may discharge an employee for "a good reason, a bad reason, or no reason at all." *Gossen Company*, 254 NLRB 339, 355 (1981), *enforced in part, denied in part*, 719 F.2d 1354 (7th Cir. 1983); *NLRB v. Meinholdt Manufacturing, Inc.*, 451 F.2d 737, 739 (10th Cir. 1971). *See also, Goldtex, Inc. v. NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994)

("[u]nwise and even unfair decisions to discharge employees do not constitute unfair labor practices unless they are carried out with the intent of discouraging participating in union activities"); *West Covina Disposal*, 315 NLRB 47, 64 (1994) (deferring to employer's "business judgment" that employee should be discharged). As such, "it is not for the Board to substitute its judgment for that of an employer in deciding what are good or bad reasons" for taking an adverse action. *Kellwood Company*, 299 NLRB 1026, 1040 (1990); *Central Freight Lines*, 255 NLRB 509, 510 (1981), *enforced*, 666 F.2d 238 (5th Cir. 1982). *See also Ryder Distribution Resources, Inc.*, 311 NLRB 914, 816 (1993).

As discussed fully below, the General Counsel failed to satisfy even his initial burden under *Wright Line*. To begin with, the General Counsel failed to offer any evidence to demonstrate that the sole individual involved in the decision to terminate Mr. Bartolo's employment – Peter Orlando – had any discriminatory animus towards Mr. Bartolo's alleged protected activity. To the contrary, even if the ALJ were to credit Mr. Bartolo's extraordinary testimony regarding his conversation with Mr. Sheeks, there is no credible evidence in the record to demonstrate that Mr. Orlando had any knowledge of Mr. Bartolo's protected activity. Finally, assuming the General Counsel could get beyond the substantial deficiencies in his case-in-chief (which he cannot), the General Counsel did not introduce any evidence to demonstrate that Mr. Orlando's decision to terminate Mr. Bartolo for his continued performance deficiencies was pretext for unlawful retaliation under Sections 8(a)(1) or 8(a)(4) of the Act.

**A. The General Counsel Did Not Establish a *Prima Facie* Case under *Wright Line*.**

**i. The Undisputed Evidence Demonstrates that Mr. Orlando Was the Sole Decision-Maker for the Decision to Terminate Mr. Bartolo's Employment.**

The clear, incontrovertible evidence in the record demonstrates that the decision to terminate Mr. Bartolo's employment was made solely by Peter Orlando. The only evidence as to who made the decision to terminate Mr. Bartolo came from the testimony of Mr. Orlando. As noted above, Mr. Orlando credibly testified:

Q: And was the decision to terminate Mr. Bartolo's employment your decision?

A: Yes.

Q: And when did you make that decision again?

A: Thursday.

Q: Thursday, what date?

A: What date? The 27th.

Q: *Prior to making that decision, did you talk to anybody else about the decision?*

A: *No.*

Q: *Did you discuss the decision with Aaron Sheeks?*

A: *I did not.*

Q: *Did you discuss the decision with Brad Title?*

A: *I did not.*

[TR 128-29 (emphasis added)]

Significantly, the General Counsel offered no evidence to rebut or contradict Mr. Orlando's testimony on this point. While Counsel for the General Counsel spent a

considerable amount of time going through Mr. Orlando's phone records in the days leading up to his decision to terminate Mr. Bartolo to suggest that he had spoken to Mr. Sheeks and Mr. Title, Mr. Orlando remained adamant that he did not discuss his decision with either individual. [TR 136:18-137:11] Significantly, Mr. Bartolo's own testimony confirmed that Mr. Sheeks *was unaware* of the decision to terminate prior to Mr. Bartolo telling him about it. According to Mr. Bartolo, after Mr. Orlando called him on July 27<sup>th</sup> to inform him of his decision to terminate Mr. Bartolo's employment, Mr. Bartolo then contacted Mr. Sheeks who was unaware of his termination:

Q: After you had this conversation with Mr. Orlando, did you have any other conversations with anyone in the Company on that day?

A: Yeah, I called up Aaron and let him know that I had been fired. *He didn't know I was getting fired because it wasn't his doing.* He said that I was impressed with what you've done the last week. He said that I'll get on my feet and that it wasn't his doing.

[TR 37:4 – 11 (emphasis added)] The evidence clearly establishes that the decision to terminate Mr. Bartolo was Mr. Orlando's decision and his alone.

ii. **The General Counsel Did Not Produce Any Evidence to Show that the Decision to Terminate Mr. Bartolo Was Motivated by a Discriminatory Animus.**

As required by *Wright Line*, the General Counsel has the burden to demonstrate that Mr. Bartolo's participation in protected activity "was a substantial or motivating reason" for the adverse employment action. *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981). In order for the General Counsel to satisfy his *prima facie* case, he must show that Mr. Orlando had knowledge that Mr. Bartolo had threatened to go to the "Labor Board" at some point prior to making his decision to terminate Mr. Bartolo's

employment. As explained below, the record is devoid of *any* evidence to demonstrate that Mr. Orlando had knowledge of Mr. Bartolo's purported threat to go to the "Labor Board."

As an initial point, Mr. Orlando credibly testified that he did not have any knowledge of Mr. Bartolo's alleged threat to go to the "Labor Board" prior to making the decision to terminate Mr. Bartolo on July 27<sup>th</sup>. Mr. Orlando adamantly testified as follows:

Q: Prior to making that decision, did you have any knowledge that Mr. Bartolo threatened to file any type of charge with the Labor Board?

A: *Absolutely not.*

Q: Prior to making that decision, did you have any knowledge that Mr. Bartolo had made any type of threat to file a lawsuit?

A: No.

[TR 129:21 – 130:3 (emphasis added)] With equal conviction, Mr. Orlando further testified that he did not receive any emails from Mr. Bartolo in which he had alleged to go to the "Labor Board":

Q: Prior to making this decision, did you ever receive any email from Mr. Bartolo in which he referenced the National Labor Relations Board?

A: *Never, no.*

Q: Have you ever received any email from Mr. Bartolo?

A: *No, I never received an email on that threat.*

Q: Let me just finish, so that it's clear. Have you ever received any email from Mr. Bartolo in which he referenced the National Labor Relations Board?

A: *No.*

[TR 130:4-13 (emphasis added)]

The only evidence that the General Counsel offered to suggest that Mr. Orlando could have had the requisite knowledge was Mr. Bartolo's testimony that he sent an email to Mr. Orlando at some point after he received his PIP on July 24, 2017 in which Mr. Bartolo threatened to go to the "Labor Board" because of his perceived mistreatment by Gubagoo. While Gubagoo did produce Mr. Bartolo's July 24<sup>th</sup> response to the PIP in which he states that he felt he was "being targeted which caused a very hostile work environment," *there is no reference in that email to the "Labor Board" or any type of threat.* [GC Ex. 3] There is also no evidence<sup>10</sup> – beyond Mr. Bartolo's own testimony – that he actually sent a subsequent email to the July 24<sup>th</sup> email to Mr. Orlando and Mr. Sheeks in which he threatened to go to the "Labor Board."<sup>11</sup>

The General Counsel simply failed to produce sufficient evidence to establish its *prima facie* case regarding Mr. Bartolo's termination and, therefore, the allegation must be dismissed.

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<sup>10</sup> Significantly, both the Region and the General Counsel issued subpoenas in this case seeking relevant email correspondence. Gubagoo never produced such an email because no such email exists. Notably, the General Counsel has never suggested that Gubagoo did not fully respond to these subpoenas.

<sup>11</sup> As noted above, *over a week after his termination*, Mr. Bartolo sent an email to Gubagoo threatening legal action and to take Gubagoo to "court" over his final pay, which he did not believe was accurate. While this is irrelevant because it was sent after he was informed of the termination decision, it also does not constitute protective activity under the Act. [R Ex. 7]

**b. The Evidence Demonstrates that Gubagoo Had a Legitimate, Non-Discriminatory Reason for Mr. Bartolo's Termination.**

Even if the General Counsel had established its *prima facie* case (which he did not do), the overwhelming evidence in the record demonstrates that Gubagoo had a legitimate, non-discriminatory reason for Mr. Bartolo's termination: Mr. Bartolo's continued performance issues, which Mr. Bartolo simply refused to address. As will be explained below, Mr. Orlando made the decision to terminate Mr. Bartolo after Mr. Bartolo missed multiple mandatory training sessions and failed to show any signs that he could attain the goals set out for him in his July 24<sup>th</sup> PIP. While the General Counsel will argue that Mr. Orlando made the decision to terminate Mr. Bartolo's employment just days after placing him on the PIP because he learned of Mr. Bartolo's alleged threat to the Board, there is absolutely no evidence in the record to support this theory.

As described above, Mr. Bartolo's performance was poor throughout his employment with Gubagoo, but, as he even admits, was especially bad during the month of June 2017. [TR 25] By the end of June, Mr. Bartolo acknowledged that he was concerned for his job and that he would "understand" if the Company fired him based on his poor performance. [TR 115; R Ex. 1, R Ex. 2] As Mr. Orlando testified, he considered terminating Mr. Bartolo in late June, but was convinced by Mr. Title to give him another opportunity following the Company's mid-July sales conference. [TR 114-15] Mr. Bartolo failed to meet his sales quota in June and showed no signs that he would meet the quota for July. [TR 128, 133-34; R Ex. 8] During the sales conference in Florida in mid-July, the Company's CEO, Brad Title, spoke to the entire sales team about the need to

improve their sales performance and about the changes Gubagoo was making to its sales presentation. He directed all employees to go home and make sales calls the Saturday after the conference. He also stressed the importance of the mandatory sales training on the new PowerPoint, which would take place the following week. [TR 118-19; 121-22]

Rather than viewing this as an opportunity to improve his performance, Mr. Bartolo failed to make the required calls on Saturday. [TR 122-23] As detailed above, his explanations for why he did not make the Saturday calls has been inconsistent. As a result, Mr. Orlando placed Mr. Bartolo, and another sales director who also failed to make the Saturday calls, on Performance Improvement Plans. [TR 123-25; GC Ex. 3; R Ex. 8] Mr. Bartolo's PIP set forth specific requirements to which Mr. Bartolo had to comply in order to improve his performance and save his job. [GC Ex. 3] On the day after receiving the PIP, July 25, 2017, *Mr. Bartolo missed the mandatory sales training.*<sup>12</sup> He was the only sales director to do so. He then was late for the sales training that took place on July 26<sup>th</sup>. Again, he was the only sales director who missed any portion of the training. [TR 127-28]

While Mr. Bartolo's call volume had spiked *substantially* during the first few days of the week of July 24<sup>th</sup>, the sudden increase seemed suspicious, especially considering that Mr. Bartolo had not secured customers demos or new contracts during that time period. [TR 133:3-19; 156:20-157:5] Moreover, the increase in the number of calls was substantial as compared to his previous call history. [*Id.*] Mr. Orlando had given Mr. Bartolo numerous opportunities to improve his performance, but Mr. Bartolo repeatedly

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<sup>12</sup> Mr. Bartolo denies that he missed the entire July 25<sup>th</sup> sales training, but admits that he overslept and missed at least a portion of the training that day. [TR 32:7-19]



squandered those opportunities. In doing so, he failed to do what was required of him by the Company's CEO: (1) make calls on Saturday; and (2) fully participate in the mandatory sales training. He was also making no progress towards the goals outlined in his PIP. Therefore, Mr. Orlando made the decision to terminate Mr. Bartolo's employment on July 27, 2017. [TR 128-29]

As the Board has long recognized, if an improper motive is not involved, the question of proper discipline of an employee is a matter "left to the discretion of the employer" which may discharge an employee for "a good reason, a bad reason, or no reason at all." *Gossen Company*, 254 NLRB 339, 355 (1981), *enforced in part, denied in part*, 719 F.2d 1354 (7th Cir. 1983). In the instant case, the overwhelming evidence in the record demonstrates that Gubagoo had a legitimate, non-discriminatory reason for Mr. Bartolo's termination. The General Counsel's allegation regarding Mr. Bartolo's termination must be dismissed.

### **CONCLUSION**

Because the General Counsel has failed to satisfy his burden to establish any of the other unfair labor practice allegations asserted against Gubagoo, the General Counsel's Complaint against Gubagoo must be dismissed in its entirety.

DATED: April 24, 2018.

JACKSON LEWIS P.C.

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***Via E-Gov, E-Filing, Via U.S. Mail to:***

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